

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24207
Docket Number MW-24099

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Detroit, Toledo and Ironton Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The suspension of sixty (60) days imposed upon Trackman B. C. Knight for alleged insubordination and for alleged use of foul and abusive language on May 2, 1979 was without just and sufficient cause and in violation of the Agreement.

(2) Trackman B. C. Knight shall now be allowed the benefits prescribed in Agreement Rule 34(e)."

OPINION OF BOARD: Claimant herein was assessed a sixty day suspension following an investigation in which he was charged with insubordination and using profanity addressed to his supervisor. The record indicates that he had been removed from service and told he was "fired" on the day of the incident.

The transcript of the investigation reveals that the entire incident covered approximately two sentences from each of the two participants and that Claimant did indeed use profanity (admitted by him) and that he charged the supervisor also with using improper language. The latter charge is unsubstantiated by the evidence.

Petitioner raises a serious procedural issue with respect to the role of the hearing officer: that Claimant was not afforded a fair investigation in view of the multiple roles of the hearing officer as charging officer, conducting officer and also assessing the discipline. This issue has been disposed of in numerous prior decisions of this Board. It is well established, in spite of the virtual impossibility of total impartiality by any Carrier Officer acting as a hearing officer in a disciplinary investigation, that the multiple roles complained of herein are not prohibited by the Agreement. It is only when a hearing officer acts as a witness as well as the other obvious roles that it has been found to constitute a deprivation of due process to the employees being investigated.

A careful evaluation of the record herein indicates certain improprieties on the part of the supervisor involved in the incident. First, he had no authority to "fire" the Claimant prior to an investigation. Secondly, his very removal of the Claimant from service does not appear to be warranted by the nature of the infraction: it did not constitute a major offense, as the Board views it. The record also reveals that the insubordination did not

involve an outright refusal to work but in essence was a verbal confrontation between the supervisor and Claimant. It is noted that the direct first line supervisor did not allege that the men (including Claimant) had refused to work. Nevertheless, the profanity used by Claimant and his verbal attack on the supervisor was clearly evinced by the testimony and cannot be condoned. The Board concludes that although Claimant was guilty and discipline was appropriate, under all the circumstances indicated supra, the measure of discipline was too severe for the infraction. Thus, the discipline must be termed arbitrary and will be reduced to a thirty-day suspension. Claimant will be made whole for all losses sustained in excess of thirty days.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the discipline was arbitrary and excessive.

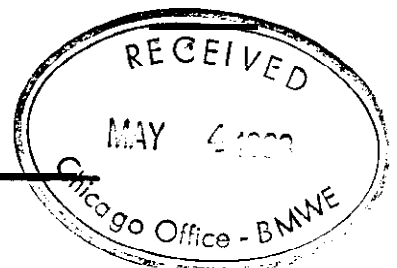
A W A R D

Claim sustained In accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant



Dated at Chicago, Illinois, this 14th day of March 1983.